No. 00-1406

DEC 26 2001

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IN THE

Supreme Court of the United States

Chevron U.S.A., Inc.,

Petitioner,

v.

Mario Echazabal,

Respondent.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of *Amicus Curiae*
Society for Human Resource Management
In Support of Petitioner

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December 26, 2001

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INTEREST OF *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM") submits this brief in support of Petitioner, Chevron U.S.A., and from the perspective of the human resource professional.[1] For over 50 years, SHRM remains the voice of human resource professionals charged with complying with a myriad of workplace laws and concerns in managing employees in a variety of workplace settings. SHRM represents over 165,000 human resource professionals in the United States and worldwide, and is the world's largest human resource management association.

The issue of whether persons protected under the Americans With Disabilities Act can be denied or held out of a job on the basis of threats to the individual's health or safety is of great importance to SHRM members. In their day-to-day work, human resource professionals are positioned in the middle of this issue. Human resource professionals constantly assist their respective organizations with complying with the fluid requirements of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* ("ADA"). SHRM members are also charged with implementing appropriate measures to keep their respective organizations' employees productive and safe. Finally, SHRM members are responsible for helping their organizations avoid liability under workplace anti-discrimination, safety, and workers' compensation laws. Furthering the laudable goals of one of these legal schemes should not beget liability under another. Yet, the Ninth Circuit's opinion below places employers in the untenable position of choosing between strict ADA compliance and protection of the safety of all employees in the workplace.

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[1] *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the consent of the parties. The parties represent that they are filing written consent for all amicus briefs with the Court. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

Under the Ninth Circuit's decision, an individual with a disability insisting on staying in a job he or she can perform day to day, but which subjects the individual to a very real risk to their safety or health, forces the employer into a Hobson's Choice from which the organization cannot escape without incurring liability.

The ADA was designed to promote workplace equality and integration, not workplace libertarianism peculiar to individuals with disabilities. SHRM believes that the ADA allows, and common sense mandates, employers to remove individuals with and without disabilities from situations endangering their health and safety, in keeping with uniform workplace standards. Otherwise, human resource professionals and their organizations will be bound to accept the legal, moral and financial consequences of devil-may-care determinations by employees with disabilities that others in the workplace are not free to make.

SUMMARY OF ARGUMENT

Respondent rightly argues that subjecting individuals with disabilities to disparate paternalism is a form of discrimination that ADA sought to abolish. Excluding individuals with disabilities from jobs, based on stereotypes with no factual or individualized grounding, "for their own good" is as much of a bar to equal employment as invidious discrimination. Qualified individuals with disabilities are entitled to the same respect and rights afforded to all employees. The ADA, however, did not mandate greater employer deference to the choices of individuals with disabilities than to the choices of employees not protected under the ADA. Workplace rules and standards inherently limit the self-determination of individuals working for the organization. Holding individuals with disabilities to the same standards and rules places these individuals in the mainstream with others in keeping with the ADA's laudable goals.

Forbidding an employer from removing an employee with a disability from a position that, with or without a reasonable accommodation, threatens the safety or health of the individual puts the employer in a "Catch-22" situation. Employers are legally, morally and financially responsible for removing all employees from conditions in the workplace unduly threatening the individual's or others' safety. If an individual not protected by the ADA can be removed from a position or situation in order to protect their safety, then an individual with a disability can be removed equally – not as a subterfuge for discrimination, but as a means to provide the same protections and restrictions afforded to all employees. That a particular individual with a disability may be more susceptible to harm, even with a reasonable accommodation, does not render efforts to protect the individual's safety unlawfully paternalistic or patronizing. Rather, it places all individuals in the workplace on equal footing, recognizing the unique needs and limitations of the individual just as the ADA and common sense envision. Most individuals, when confronted with reliable information showing a heightened, substantial risk to their health or safety in their job, will inevitably choose a reassignment or another line of work. Others, for economic or other personal reasons, may seek to defy the very real risks. In a workplace in which nobody has an absolute right to harm or kill themselves, individuals with disabilities should be treated no better and no worse.

Under the Ninth Circuit's current holding, human resource professionals may warn an individual with a disability of the risks of continuing to work in a particular position, let the employee decide whether or not to stay, and then stand by idly while the individual is harmed. The individual is not the only party at peril. Allowing an individual to insist on working to the detriment of his or her health and safety, in spite of reliable medical evidence of a hazard to the individual, places the individual and the organization at undue risk. The ADA does not grant individuals with disabilities greater rights than other employees to determine their own fate, subject themselves to

inevitable harm, or unilaterally subject their unwilling organization to workers' compensation and, perhaps, Occupational Safety and Health Act liability for allowing them to imperil their health and safety as a result of their work. The implications of the Ninth Circuit's holding, however, "whipsaw" employers in exactly this manner.

SHRM, therefore, urges this Court to accept individual and collective safety as a job-related qualification standard, consistent with business necessity, within the meaning of the ADA, and to adopt a practical rule allowing employers to comply with its obligations to protect individuals' safety without incurring ADA liability. As such, the Ninth Circuit's holding -- that the ADA does not permit employers to exclude employees with disabilities on the basis of a threat to their individual safety and health -- should be reversed.

ARGUMENT

A. The ADA Does Not Excuse Individuals With Disabilities From Safety And Health Standards Legitimately Imposed On All Employees

The Congressional Findings and Purpose section of the ADA declares that "the Nation's goals regarding individuals with disabilities are to assure *equality* of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8) (emphasis supplied). Under Title I of the ADA, on employment, the ADA states that "no covered entity shall discriminate against a *qualified* individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis supplied). For all employees, returning home from work, safe and uninjured, is far and away one of the most significant --yet often taken for granted -- privileges, terms and conditions of employment. Treating all employees

alike in connection with guarding individual safety is consistent with the goals and limitations of the ADA.

Unless an employer is discriminating against an entire group of employees, as in the case of *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), employers have every right, and indeed responsibility, to protect employees from harm to their health or safety. No law stops an employer from removing a particular employee without a disability from a work environment that poses a danger to that individual's safety or health. For example, in *Equal Employment Opportunity Commission v. Woodbridge Corp.*, 263 F.3d 812 (8th Cir. 2001), the court held that applicants not found to have "disabilities" within the meaning of ADA could be excluded from specific manufacturing line work because test results showed that those individuals were susceptible to repetitive motion injuries from the job.[2] The employer subjected all applicants and employees to these standards. *Id.* at 815. In upholding the legality of this practice and affirming summary judgment for the employer, the Eighth Circuit explained:

> While it may be desirable for a test to be designed and administered that could determine an activity that may prove harmful, that is not the issue before us. There are groups, to include some governmental agencies, who would state that a worthwhile goal for an employer would be to develop protocols that would limit injuries in the workplace and to include tests designed to determine those who may be predisposed to such injuries.

Id. at 815.

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[2] The court held that these individuals did not have disabilities, as they were not "substantially limited" in the major life activity of working a broad range of jobs, and that the employer did not regard these individuals as being substantially limited.

Following the reasoning in *Woodbridge*, an individual may have a physical impairment that does not rise to the level of a disability because the impairment may not substantially limit a major life activity of the individual. Yet, the impairment may create a greater susceptibility to injury or health hazards. Examples of this may include the steelworker with vertigo, or the beekeeper with a severe allergy to bee stings raised in Judge Trott's dissent in *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1074 (9th Cir. 2000) (Trott, J., dissenting). Even without an actual disability, an individual's make-up, strength, skill level, or other non-disabling limitations may render that individual particularly susceptible to harm under certain workplace conditions. Assume further that no one regards this individual as substantially limited in a major life activity. As long as the individual is not treated more harshly on the basis of their age, gender, or other protected characteristic, there is no legal impediment to their employer removing them from a job in which they are endangering themselves. In other words, as long as the employer is not making a sweeping generalization regarding the individual's age or gender, and using stereotypes or double-standards as the basis for determining that the individual is imperiling their own health or safety, then making the pragmatic decision not to allow the individual to harm himself on the job is lawful.

Persons susceptible to harm in a work environment, whether they have a disability or not, should be treated equally. Employers should not be forced to acquiesce to an employee's impending injury or unfortunate death, even if that is what the employee desires. For example, an employer should have the right to disarm a security guard exhibiting suicidal tendencies. Yet, under the Ninth Circuit's opinion, an individual protected under the ADA must be treated differently. The individual with a disability can, at best, be warned by the employer of the potential risks of working in their particular job or environment. The employer, however, is saddled with whatever decision – even a self-destructive decision – the employee with a disability makes. This paradox awards the individual with a disability greater rights of self-determination than others enjoy in the workplace. This transforms the ADA, as the Seventh Circuit held in *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (a reasonable accommodation case), into a "mandatory preference" statute at odds with ADA's nondiscriminatory and mainsteaming aims. *Id.* at 1028. The Seventh Circuit decried the practice of "giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace. . . ." *Id.* at 1029. Similarly, requiring an individual with a disability to remain in a dangerous job – when an employee without a disability but also susceptible to harm would have been removed – accords that individual a preference solely on the basis of his or her protected status. Again, this odd type of "preference" is not mandated under the ADA.

B. Allowing Individuals To Decide To Work At Their Peril Places Employers In An Untenable Position

Respondent also argued, at the writ of certiorari stage, that the individual should be free to decide whether or not to risk personal harm in working a particular job, and that the individual should not be restricted by the employer's "paternalistic concerns."[3] Although Respondent is correct in contending that the ADA protects individuals with disabilities from paternalism, based on myths and stereotypes and acting to deny employment opportunities for which they are

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[3] *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, at 9, 25. Respondent looked to *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991) ("*Johnson Controls*") for this proposition. *Johnson Controls*, however, does not hold that an employer cannot bar an employee from a job based on an individualized determination on the objective risks to that particular person. Rather, *Johnson Controls* speaks to group-based (gender-based) classifications imposing different exclusionary safety standards on women from the standards applied to men. *Id.* at 197-99.

qualified, removing individuals from objective rather than imagined hazards is not the type of "paternalism" the ADA was intended to bar.[4] There is a manifest difference between (1) excluding an individual with a degenerative illness from employment based on a belief that the individual may become unproductive at a later time, or based on paternalistic stereotypes that a person with a disability could get sick or hurt on the job, and (2) excluding an individual from employment based on an objective, reliable and individualized assessment of the person's susceptibilities to harm arising from performance of the particular job they hold or desire.

This is more than simply a case of personal self-determination. A devil-may-care employee, wishing to work a particular job in spite of real risks, has an unwilling partner. Ultimately, employers are legally and financially responsible for an employee's safety.

1. The Ninth Circuit's Decision Creates Havoc With State Workers' Compensation And Tort Schemes.

The Ninth Circuit's opinion places employers in the untenable position of choosing between strict ADA compliance and incurring new liabilities under various state and federal workers' compensation and tort liability schemes. Under the reasoning of the Ninth Circuit in *Echazabal*, American employers will be exposed to additional liability in two anticipated ways. First, employers will be liable to an individual with a disability insisting on staying in a job he or she can perform day to day, but which subjects the individual to a very real risk of further injury. Additionally, employers may be exposed to general tort liability for the subsequent

[4] The Congressional Findings and Purpose to the ADA decries "overprotective rules and policies" (42 U.S.C. § 12101(a)(5)) and other forms of discrimination "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals. . . ." 42 U.S.C. § 12101(a)(7).

harms befalling workers with disabilities, notwithstanding the general rule of exclusiveness of most workers' compensation statutes. Consequently, the Ninth Circuit opinion also forces the employer into another Hobson's Choice from which the employer cannot escape without incurring added and often hidden liability.

Workers' compensation is a uniquely American mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, with premiums passed on in the cost of the product. See Larson, A and Larson, L, LARSON'S WORKERS' COMPENSATION LAW Volume 1, Chapter 1, Scope (Matthew Bender & Co.). Workers' compensation is fundamentally different from strict tort liability in its basic test for liability, which is work connection rather than fault. *Id.* Workers' compensation is further fundamentally different from strict tort liability in a number of other ways, including (1) its underlying philosophy of social protection rather than righting a wrong, (2) the nature of the injuries compensated, (3) the elements of damage, and (4) the defenses available. *Id.* The American workers' compensation system is also conceptually distinguishable from public social insurance in a number of ways, most significantly, for the purposes of this discussion, in its mechanism of unilateral employer liability. *Id.* The Ninth Circuit's opinion in *Echazabal,* has the unrealized but realistic consequence of blurring beyond recognition these distinctions, thereby rendering the system unpredictable, and of transforming the nation's various workers' compensation schemes into employer-funded social insurance programs. It does so by requiring employers to assume the liability for all subsequent injuries to employees with disabilities insisting on working a particular job despite real and heightened risks of harm.

> In relevant part, the typical workers' compensation act has the following features:

> (a) The basic operating principle is that an employee is automatically entitled to certain benefits whenever the employee suffers a 'personal injury by accident arising out of and in the course of employment' or an occupational disease; (b) negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his or her rights and in the sense that the employer's complete freedom from fault does not lessen its liability; ... (e) the employee and his or her dependents, in exchange for these modest but assured benefits, gives up their common-law right to sue the employer for damages for any injury covered by the act;

Id. at §1.01.[3]

Compensation under such schemes is often contrasted with tort liability. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and for the most part, fault, are not an issue and cannot affect the result." *Id.* at §1.03.

Of the two components of the almost-universal coverage formula under American workers' compensation schemes—"arising out of" and "in the course of" employment—the "arising out of" test is primarily concerned with causal connection. Most courts in the past interpreted "arising out of employment" to require a showing that the injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his or her employment. *Id.* at Chapter 3, Scope. A substantial number now have

[3] The sum total of these ingredients is a uniquely American system which is neither a branch of tort law nor social insurance of the British or continental type, but which has some of the characteristics of each. *Id.* at §1.02.

modified this to accept a showing merely that the risk, even if common to the public, was actually of this employment. *Id.* An important and growing group of jurisdictions have adopted the positional-risk test, under which an injury is compensable if it would not have happened but for the fact that the condition or obligations of the employment put claimant in the position where he or she was injured. *Id.* Under the Ninth Circuit decision, American employers will now be liable for any subsequent injury to workers with disabilities as a result of the decision's instruction to disregard any risk of safety to the worker protected under the ADA.

A troublesome aspect of the workers' compensation scheme is the mixed risk phenomenon. This includes a personal cause and an employment-related cause combined to produce the harm at issue. "The most common example is that of a person with a weak heart who dies because of strain occasioned by the employment. In its broadest theoretical outline, the workers' compensation rule is simple: The law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability." *Id.* at § 4.04. Consequently, the social cost of subsequent injuries suffered by any individual with a disability remaining at risk under the Ninth Circuit's holding will become another cost of doing business in America. American employers become the insurer of cash-wage benefits and medical care to those victims of subsequent work-connected injuries who are now free to ignore without risk their personal limitations and susceptibilities.

Ordinarily, injuries arising out of the risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. *Id.* Volume 6, Chapter 9, Scope. When the employee has a preexisting physical weakness or disease, this employment contribution may be found either in placing the employee in a position which aggravates the effects due to an

idiopathic condition or in precipitating the effects of the condition by strain or trauma. *Id.*

> 'Aggravating' the preexisting condition is exemplified by cancer cases in which the malignant growth is ruptured or spread by occupational exertions, or in which its development is hastened by strains, impact, inhalations, or accidents in the course of employment. The preexisting condition may be any kind of weakness. It may be a syphilitic condition, as in the case in which injuries from an automobile accident combine with a syphilitic condition to produce insanity. It may be mental or nervous in character, as in the case of a worker who has recovered from a paranoid schizophrenia, but suffered a recurrence as a result of a fall. It may be a back condition, or a weakened limb, as in the case of a worker whose arm had previously been broken and had healed poorly, so that it would be injured by a mishap that probably would not have hurt a normal arm. Related examples included the kind of situation in which a claimant suffers a minor cut or blow, but because of diseased blood or other internal condition undergoes a prolonged or serious disability. Here too are many mentioned allergies which combine, for example, with a particular kind of soap associated with the work, to produce an injury which other employees are not subject to, but which the claimant would not have encountered in this degree but for the employment. A common category of employment 'combining with' the internal weakness to produce disability is that of a hernia. In the absence of a restrictive statutory provision, it has been held, for example that a hernia suffered while the employee was bending over to untie his shoes while changing his clothes before starting work was compensable, even though he had two prior hernia operations in this same place.

Id. at § 9.02[3].[6] There can be little doubt that employers become the unwilling insurers of these subsequent injuries as a result of the decision below.

Another concept of workers' compensation jurisprudence compromised by the decision of the Ninth Circuit is that of exclusivity. As usually contemplated, the workers' compensation remedy is considered to be exclusive of all other legal remedies by the employee or the employee's dependents against the employer and insurance carrier for the same injury, if the injury falls within the coverage formula of the workers' compensation act. *Id.*, Volume 6, Chapter 100, Scope.' "This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new

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[6] Various cases have resulted in benefit awards for aggravating a pre-existing condition, such as arthritis, back ailments, cancer, circulatory disorders, diabetes, or obesity, resulting from strains, impact, exposures, or accidents in the course of employment. *See e.g. Potenza v. United Terminals, Inc.*, 524 F.2d 1136 (2d Cir. 1975); *Hawkins v. Green Associated*, 559 P.2d 118 (Alaska 1977); *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984); *McAllister v. Workmen's Compensation Appeals Board*, 445 P.2d 313, 71 Cal. Rptr. 697 (Sup. Ct. 1968); *Urban v. Morris Drywall Spray*, 595 So. 2d 60 (Fla. Dist. Ct. App. 1992); *Fincannon v. Eastern Airlines*, 611 So. 2d 28 (Fla. Dist. Ct. App. 1992); *Concrete Structures of the Midwest v. Industrial Commission*, 351 Ill. App. 3d 596, 734 N.E.2d 970 (2000); *Parks v. Sheller-Globe Corp.*, 177 Ind. App. 498, 380 N.E.2d 110 (1978); *Fiffie v. Borden, Inc.*, 618 So. 2d 1199 Ct. App.), *review denied*, 624 So. 2d 1235 (La. 1993); *Achord v. H.E. Weise Constr. Co.*, 422 So. 2d 1248 (La. Ct. App. 1982); *Hopp v. Grist Mill*, 499 N.W.2d 812 (Minn. 1993); *Miller Transporters, Inc. v. Guthrie*, 554 So. 2d 917 (Miss. 1989); *Normile v. Thomas P. Spagnoletti Constr. Co.*, 27 A.D.2d 169, 277 N.Y.S.2d 155 (1967); *U-Haul of Oregon v. Burtis*, 120 Or. App. 353, 852 P.2d 897, *review denied*, 318 Or. 26, 862 P.2d 1306 (1993); *Gallardo v. Workers' Compensation Commissioner*, 373 S.E.2d 177 (W.Va. 1988).

[7] "Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents against the employer and insurance carrier." *Id.* at § 100.01[1].

liability without fault, it is relieved of the prospect of large jury verdicts." *Id.* The Ninth Circuit decision casts doubt on the continuing vitality of the exclusivity doctrine.

Furthermore, in an employee's action to recover tort damages for a work related injury, the employer bears the burden of proving the affirmative defense that the plaintiff was an employee entitled only to workers' compensation. *Id.* at § 100.01[2] (citations omitted). "The controlling fact in establishing exclusiveness is the relationship of the parties at the time of occurrence of the injury." *Id.* at § 100.01[3]. The operative fact in establishing exclusiveness is that of actual coverage, not of election to claim compensation in the particular case. *Id.* at § 100.01[4]. The exclusiveness rule is designed to relieve the employer not only of common-law tort liability, but also of statutory liability under all state and federal statutes as well as of liability in contract and in admiralty, for an injury covered by the compensation act. *Id.* at § 100.03[1] (citations omitted). A distinction is drawn, however, between an injury which does not come within the fundamental coverage provisions of a workers' compensation act, and an injury which is in itself covered but for which, under the facts of the particular case, no compensation is payable. *Id.* at § 100.04. In the former class, are the cases in which the employment relation did not exist, or in which plaintiff or the plaintiff's employer was within an excluded category, or in which there was no "injury by accident arising out of or in the course of employment." *Id.* "Before occupational diseases were specifically made compensable, and in jurisdictions where they are still non-compensable on the ground that they do not constitute accidental injury or are not among listed diseases, it had been the usual holding that the existence of compensation legislation did not bar any rights to sue at common-law, or under factory or safeplace acts, that might otherwise exist. *Id.* This notion was previously "clearly correct, since if compensation is unavailable for such diseases, it can only be because they do not in the particular jurisdiction satisfy the basic coverage clause, especially the 'accidents' requirement, and are,

therefore, in the same position as injuries to non-employees or injuries not arising in the course of employment." *Id.*

Examples in which tort actions have been allowed notwithstanding the exclusivity doctrine include the aggravation of a non-occupational disease. *Id.* For example, in *Hotaling v. General Elec. Co.*, 12 N.Y.2d 310, 239 N.Y.S.2d 344, 189 N.E.2d 698 (1963), an employee's action against the employer for common-law negligence and violation of labor laws was permitted where a disability caused by aggravation of a non-occupational disease was not compensable under the New York workers' compensation act. To the same effect see, *Errand v. Cascade Steel Rolling Mills,* 320 Or. 509, 888 P.2d 544 (1994), where a plaintiff with a preexisting sinus condition that predisposed him to airway irritation was allowed to maintain a tort action against his employer as a result of the airway irrigation he experienced following his inhalation of substances in the workplace. In light of the Ninth Circuit's decision, American employers may become increasingly subject to tort liability in connection with the employment of workers susceptible to particular types of harm yet protected under ADA and the Ninth Circuit's decision. This unintended consequence of the Ninth Circuit's decision cannot be ignored or overstated.

2. The Ninth Circuit's Decision Places Employers At Risk Under The Occupational Safety And Health Act.

In addition to workers' compensation or tort liability, the general duty clause of the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 654(a), and parallel state laws (*e.g.* Cal. Lab. Code § 6402) create a non-waivable obligation upon employers to furnish a workplace free from recognized hazards that pose the risk of death or serious injury to employees. Employers may be held liable under OSHA's general duty clause as soon as the employer has knowledge of the hazard and when such hazards are "feasibly preventable." *E.g. Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976). The Occupational Safety and Health Administration is

also able to (and often does) issue citations for safety violations covered under this general duty clause, even though specific OSHA standards are not implicated. 29 U.S.C. § 654(a)(1); *International Union v. General Dynamics Land Systems Div.*, 815 F.2d 1570 (D.C. Cir. 1987) ("general duty" violation may occur even if employer complies with requirements of a specific OSHA standard, if compliance was inadequate to eliminate a known hazard). Compliance with safety standards is, and should be, recognized as a defense against discrimination charges under the ADA. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 570 (1999); 29 C.F.R. § 1630.15(e). The Ninth Circuit's holding, however, conceivably denies employers this defense when individuals protected under the ADA are involved.

Respondent has labeled the general duty clause of the Occupational Safety and Health Act as a "simple expedient" for excluding employees with disabilities. *See* Brief in Opposition to Petition for a Writ of Certiorari, at 26. This argument, however, overlooks ADA's reasonable accommodation requirement, which mandates that employers undertake, upon request, measures to enable an otherwise qualified individual with a disability to perform the essential functions of their job and satisfy qualification standards. 42 U.S.C. §§ 12112(b)(5)(A), 12113(a); *see also* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under ADA (March 1, 1999), question 11 (envisions reasonable accommodations to eliminate a safety threat; rejection of such an accommodation may render individual not "qualified"). This obligation could include taking additional but effective safety precautions or using different equipment to enable the individual to be no more susceptible to harm or injuries than others. A reasonable accommodation may also include reassignment to a different, vacant position for which the individual is qualified and in which the individual does not face the same, real levels of

exposure to harm or injury.[8] If, however, a reasonable accommodation cannot sufficiently minimize a very real and substantial risk of harm to the individual, then, as described above, the employer remains in a very precarious position by keeping an employee in a position endangering his or her safety or health.

C. The Ability To Work Safely Is An Inherent Qualification Standard That Is Job-Related And Consistent With Business Necessity

The Congressional Statement of Findings and Declaration of Purpose and Policy behind the Occupational Safety and Health Act recognizes that:

> Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

29 U.S.C. § 651(a).

Congress further declared that "employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions." 29 U.S.C. § 651(b)(2). Through the Occupational Safety and Health Act, Congress therefore found that protecting individual employee's safety is a legitimate employer concern and even an obligation, or a "business necessity." Safety, as much as productivity, is a critical goal of employers. As such, employers must have a right under the ADA to include guarding safety (of the

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[8] This could include reassigning an individual with a back injury rising to the level of a disability to a less physically demanding vacant position – so long as the accommodation is otherwise "reasonable." This realistic factual situation is currently before this Court in *US Airways, Inc. v. Barnett*, No. 00-1250.

individual employee and employees collectively) as a subset among many bona fide job qualifications.

Other courts of appeals, along with the Equal Employment Opportunity Commission, have accepted this reality of the workplace. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998); *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 600, 603 (7th Cir. 1999); *Equal Employment Opportunity Commission v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000); *Reed v. Heil Co.*, 206 F.3d 1055, 1063 (11th Cir. 2000); *Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000); *Mathews v. The Denver Post*, 263 F.3d 1164, 1168 (10th Cir. 2001); *see also* 29 C.F.R. § 1630.2(q) and (r).

Excluding an individual from a job that, based on an individualized, reliable assessment, endangers his or her health or safety, therefore, should not be barred by the ADA. Such an individual is not "qualified" within the meaning of 42 U.S.C. § 12111(8). The ADA provides, in two parts of the statute, that employers may apply qualification standards "shown to be job-related for the position in question and . . . consistent with business necessity." 42 U.S.C. § 12112(b)(6);[*] 42 U.S.C. § 12113(a). The first section

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[*] Section 12112(b)(6) explains that one form of employment discrimination under ADA includes:

> [U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6) (emphasis added).

excludes application of appropriate qualification standards from the very realm of unlawful discrimination. In addition, §12113, on available defenses, explains that:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a).

The Defenses section of Title I of ADA goes on to provide an example of qualification standards, explaining that "[t]he term 'qualification standards' *may* include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (emphasis added). The use of the term "may" in this example, along with the language in §§ 12112(b)(6) and 12113(a), show that preserving the safety and health of others is by no means the exclusive example of a qualification standard that is job-related and consistent with business necessity. Otherwise, the flexible terms "job-related and consistent with business necessity" would not have been necessary either in § 12112(b)(6) or again in § 12113(a).

This Court accepted the principle that insisting on certain physical attributes needed to satisfy safety standards falls within an employer's rights. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. at 567-68. The Court appeared willing to assume that this entails consideration of the individual's capabilities, with or without a reasonable accommodation, against an otherwise justifiable job qualification, but left open the issue of whether employers must bear a higher burden, as suggested by the Government, in justifying safety-related qualification

standards. *Id.* at 568-69 and n.15, and 578 (Thomas, J., concurring).

The EEOC also accepts, in its interpretations of Title I of the ADA, the general principle that employers retain the right to exclude employees with disabilities if performing their job threatens their safety and health. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari, at 3, 8, 11, 15. The agency, however, advocates placing a harder burden on employers relying on individual safety and health considerations for their actions. The EEOC takes the approach that removing an individual whose safety is jeopardized can only be justified through the affirmative defense of "direct threat" to safety and health. *See* 29 C.F.R. §§ 1630.2(r) and 1630.15(b) and (c). This approach is at odds with other courts of appeal and with Justice Thomas' concurring opinion in *Kirkingburg*. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. at 578 (ADA plaintiff bears initial burden of showing that he or she is "qualified," which includes meeting safety standards) (Thomas, J., concurring); *Equal Employment Opportunity Commission v. Exxon Corp.*, 203 F.3d at 875; *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d at 602. Relegating employer actions motivated by the need to protect the individual's safety exclusively to the "direct threat" affirmative defense also places an uneasy onus on employers. The EEOC's approach, while at least recognizing the practical importance of protecting the individual's safety, may produce harsh effects on an employer acting in good faith but which ultimately cannot prove, by a preponderance of evidence, a "direct threat." If an employer relied on sound medical advice that later proved to be incorrect, then that employer could conceivably be liable for damages and even punitive damages after relying in good faith on a reasonably grounded medical judgment.[10]

[10] Employers are only insulated from punitive damages available under 42 U.S.C. § 1981a(b)(3) when their good faith conduct comes in the context of the reasonable accommodations process. 42 U.S.C. § 1981a(a)(3).

Even if preserving the individual's personal safety was "simply" a qualification standard under § 12112(b)(6), human resource professionals would already have to think twice to ensure that the safety-related qualification standards, and the individual's failure to satisfy them, were indeed "job-related and consistent with business necessity" and not based on discriminatory stereotypes. This demands an individualized assessment in the same manner as a determination that an individual can or cannot perform other essential, daily functions of a job. Under an affirmative defense of "direct threat," however, the employer may ultimately have to prove that it is right, rather than show that it acted in good faith on reliable, credible medical information. The EEOC's approach stands to make employers reluctant to exclude an individual with a disability, as opposed to any other employee susceptible to personal injury, based on concerns over the individual's safety.

The ADA's language describing qualification standards that are "job-related and consistent with business necessity," along with the other language of the ADA, guards against the phenomenon legitimately feared by Respondent and the Ninth Circuit: arbitrary and exclusionary "qualification standards" based on stereotypic assumptions over the ability or inability of an individual with a disability to perform a job and perform the job safely.[11] Rather, the ADA mandates an individualized assessment, based on legitimate job qualification and safety criteria measured against good faith, reliable evaluations of

[11] See 42 U.S.C. § 12101(a)(7) (stating that ADA is intended to redress "restrictions and limitations" on persons with disabilities "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals...."). See also S. Rep. No. 101-116, at 37 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), 1990 U.S.C.C.A.N. at 353 (explaining that ADA guards against employment actions stemming from "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities").

the individual's susceptibility to harm stemming from the performance of the particular job.

SHRM, therefore, urges this Court to adopt a common-sense standard, recognizing both employers' needs to guard the safety of all employees as well as the legitimate interest of individuals with disabilities fearing unwarranted exclusion from employment "for their own good." Recognizing the promotion of collective and individual safety among qualification standards that are "job-related and consistent with business necessity" places these interests in proper balance, and reconciles the goals and purposes of the Occupational Safety and Health Act with the goals and purposes of the ADA. In contrast, allowing individuals protected under the ADA to make the ultimate determination as to whether they will continue in a job posing a danger to their health or safety – as held by the Ninth Circuit and urged by Respondent – provides employees with disabilities rights superior to the rights of other employees. It also elevates the rights of individuals protected under the ADA over employers' legitimate interests in adhering to qualification standards generally and the subset of safety standards. Empowering any individual in this manner is inconsistent with the goals and requirements of the ADA and other workplace laws.

CONCLUSION

The Court should allow employers to protect their employees and themselves by adhering to safety-related qualification standards that are job-related and consistent with business necessity, and which include protection of each individual employee's personal safety at work. This approach reconciles the goals of the ADA with other laws and with the practical realities of the workplace. SHRM therefore urges the Court to reverse the Ninth Circuit, and to allow employers to make good-faith, objective assessments of threats to any individual's safety or health in applying qualification standards.

Respectfully submitted,

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December 26, 2001

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